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Supreme Court of the United States

TERM: A. D. 1949

No.....

LAWRENCE E. KELLY, Administrator of the Estate of H. M. KELLY, Deceased, and MOLLIE KELLY,
Petitioners,

v.

THE SHAMROCK OIL & GAS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The Petitioners, Lawrence E. Kelly, Administrator of the Estate of H. M. Kelly, deceased, and Mollie Kelly, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF MATTER INVOLVED

H. M. Kelly and Mollie Kelly, residents of Michigan, sold a section of land in Texas through an agent named Fowlston to the Shamrock Oil & Gas Corporation. The agent, Fowlston, lived in Texas near the land. (R. 148.) He represented the Kellys in the transaction in question and received from them a commission of $3,200.00 for his services. Unknown to the Kellys, Fowlston was also acting

as the agent of the Shamrock Oil & Gas Corporation. The Shamrock paid Fowlston a $500.00 commission for his services in the transaction. (R. 152, 153 and 157.) The Kellys did not know that Fowlston was acting as the agent of the Shamrock until after the sale was closed. (R. 108.) Kelly did not know that Shamrock was paying Fowlston a commission until after the sale was closed. (R. 107.) The Kellys had never seen the land. (R. 81.)

This suit was filed by H. M. Kelly and Mollie Kelly to rescind the deed conveying the land to the Shamrock. Plaintiffs based their suit upon two propositions: (1) that Fowlston, admittedly the seller's agent, was also acting as the agent of the purchaser unknown to the seller, and (2) various fraudulent representations which induced the sale. (R. 10, p. 6, et seq.) H. M. Kelly passed away pendente lite. His administrator was made a party Plaintiff.

A jury trial was requested and granted. The Trial Judge put the case to the jury solely on the fraudulent representations, and excluded the matter of dual agency unknown to the seller. The jury verdict was for the Shamrock. The Trial Judge made no findings of fact. The Court's charge is set out on pages 280 to 289 of the Record.

The Plaintiffs contend that Fowlston, the admitted agent of the Plaintiffs, was also acting as the agent of the Defendant purchaser unknown to the sellers. The Trial Judge refused to submit an instruction to the jury that if they found that Plaintiffs' agent, Fowlston, was also acting as the agent of the Defendant, Shamrock, unknown to Plaintiffs, the jury would find for the Plaintiffs. (R. 42,

Request No. 2 and R. 49, Request No. 10.) The Trial Judge did not believe that a dual agency situation unknown to the seller furnished grounds for rescinding the conveyance. He therefore refused the instructions requested by Plaintiffs on dual agency. The Fifth Circuit Court of Appeals held that the evidence raised an issue for the jury on dual agency, and that if Fowlston was acting as the agent of the Shamrock unknown to Kelly, the Plaintiffs were entitled to recover, but affirmed the case on the theory that the Trial Judge had instructed the jury on that very matter. The supporting brief shows that the jury were not given any instructions at all on "dual agency" unknown to one of the principals.

Circumstantial evidence was relied upon by the Plaintiffs to establish some phases of their case with reference to the fraudulent representations. The Trial Judge refused to instruct the jury on circumstantial evidence. (R. 38, Request 11.)

JURISDICTION

This Court has jurisdiction to grant a writ under Rule 38, Section 5, Sub-divisions (a) and (b) for these reasons:

(1) The Trial Judge put the case to the jury on fraudulent representations alone and excluded the issue of dual agency unknown to the seller in the face of the decision of this Court in *St. Paul, F. & M. Ins. Co. v. Bachmann, 76 L. Ed. 653*, holding that all issues must be submitted to the jury with appropriate instructions:

> "The fact that the defendant had incorporated errors of law in the instructions which it sought upon

the second defense did not justify putting the case to the jury solely upon the first."

(2) The Trial Judge refused to instruct the jury on circumstantial evidence in the face of this Court's opinion in *Rea v. Missouri, 21 L. Ed. 707*, holding that it was reversible error to refuse to charge on circumstantial evidence saying:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

The foregoing error was particularly aggravated in view of the fact that the Court instructed the jury that agency may be established by circumstances and thereby inferentially charged them that no other fact issue in the case could be proved by that character of evidence. (R. 283, top of page.)

QUESTIONS PRESENTED

(1) Can the Trial Court put this case to the jury on one phase of the Plaintiff's contentions (fraudulent representations) and refuse to give them proper instructions upon the law entitling the Plaintiffs to a verdict if the jury finds the existence of a dual agency unknown to the Plaintiff seller (Petition for Rehearing, pp. I, II, III and IV)? (2) When a portion of the Plaintiff's case stands on circumstantial evidence, is it error to refuse to give the jury a proper charge that any fact in issue may be proved by circumstantial evidence (Petition for Rehearing, p. VIII)?

REASONS RELIED UPON FOR WRIT

This case involves $65,000.00 or $70,000.00. Plaintiffs established a dual agency unknown to the seller. They were denied a verdict on that ground by the refusal of the Trial Court to charge on dual agency unknown to one of the principals. They have been denied their constitutional rights to have that issue passed upon by the jury. The Plaintiffs have not had a trial on dual agency. A motion for rehearing was overruled by the United States Court of Appeals for the Fifth Circuit on January 21, 1949. The Supreme Court is the only court with the power and authority to secure to these Petitioners their right to have that question of "dual agency" tried out in a court of justice in conformity with the laws of the land. The Fifth Circuit Court of Appeals wrote two opinions in this case holding that the Plaintiffs' theory on "dual agency" unknown to the Kellys had been fully submitted to the jury. Not a single one of those opinions points out a paragraph, sentence or phrase of the Court's charge that instructs the jury upon the law entitling the Plaintiffs to recover if they find a dual agency existed unknown to the Kellys. The reason that has not been done is that there is no such instruction in the Court's charge. *Please read the Respondent's reply to this application for a writ of certiorari and see if there is anything in that reply that points out any portion of the charge instructing the jury on the law entitling the Plaintiffs to a verdict if they find that a dual agency existed unknown to the Kellys.*

We sincerely recognize the fact that the Supreme Court of the United States is the most over-worked judicial tribunal in the world, but H. M. Kelly spent a lifetime in accumulating a portion of the proceeds of this litigation. It has been taken from him without due process of law. We earnestly urge your consideration of this application.

Respectfully submitted,

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Supreme Court of the United States

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No.....

LAWRENCE E. KELLY, Administrator of the Estate of H. M. KELLY, Deceased, and MOLLIE KELLY,
Petitioners,

v.

THE SHAMROCK OIL & GAS CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

THE OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit wrote two opinions in this case. Both opinions are reported in *171 Fed. (2d) page 909*. The opinions are also printed in full in the record. (R. 298 and R. 318.)

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code (28 U. S. C. 1254), and Rule 38, Section 5, Subdivisions A and B of the Rules of the Supreme Court of the United States. The Circuit Court of Appeals has erroneously decided questions of law in this

case that deprive the Petitioners of the right of a trial on issues of fact involving some $65,000.00 to $70,000.00 in controversy. The judgment denying a rehearing was entered January 21, 1949. (R. 318.)

STATEMENT OF THE CASE

The Petitioners, Plaintiffs in the trial court, contended that their agent, Fowlston, was also acting as the agent of the Shamrock Oil and Gas Corporation in the transaction which resulted in the sale of the Plaintiff's land to the Shamrock. The Defendant admitted that Fowlston was Kelly's agent. (R. 25, p. II.) On Pages 3 and 4 of the December 7, 1948, opinion, the Circuit Court holds that the evidence raised a question for the jury on whether or not Fowlston was also secretly acting as the agent of the Shamrock. (R. 300-301.) The law applicable to this case is stated as follows:

> "However, when it comes to a case of double agency, the principal who did not know that the agent in his employ was also the agent of the other party to the contract has the absolute right to repudiate the transaction upon the discovery of the truth—So, as a matter of public policy, it is generally held that a deal conducted wholly or in part by an agent of one of the parties who at the same time acted for the opposite party may be rescinded by the one ignorant of the double employment without showing any injury or intent to deceive. Rescission is his absolute right." *Olson v. Pettibone, 48 L. R. 915. Idem: Kansas Life Ins. Co. v. First Bank of Truscott, 78 S. W. (2d) 585 (Texas Commission, p. 2); 2 A. J., Agency, Sec. 265; Newton v. Mann, 14[illegible] A. L. R. 76, pp. 6 and 7.*

"If, without knowledge of the common agency, two persons employ the same agent to conduct a transaction between them, the transaction is voidable at the election of either." *Restatement of the Law, Agency, Section 318.*

"And it makes no difference that the principal was not in fact injured, or that the agent intended no wrong or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public policy, and the Courts will refuse to enforce a contract growing out of such agency or award damages for its breach." *Bass v. Tolbert, 112 S. W. 1078. (Texas C. C. A.)*

The Circuit Court of Appeals recognizes and holds that the foregoing is the Texas law. (Pages 3 and 4 of its opinion on December 7, 1948.) Your Petitioners requested two separate instructions on dual agency, both of which were refused. We requested this instruction:

"If you find by a preponderance of the evidence that the relation of principal and agent existed between C. J. Fowlston and the Shamrock Oil & Gas Corporation from January 20, 1941, to June 16, 1941, and if you further find from a preponderance of the evidence that H. M. Kelly did not know C. J. Fowlston was the agent of the Shamrock Oil & Gas Corporation you will return a verdict for the plaintiffs." (R. 42, Request No. 2.)

In a separate request, we also asked the trial court to give a broader charge on dual agency that plaintiffs were entitled to, but which the court refused, reading:

"You are instructed that if C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation during the negotiations leading up to the execution of the Deed, dated June 16, 1941, and that if you further find that H. M. Kelly did not know that C. J.

Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation, you will return a verdict for the plaintiffs, and this without reference to whether or not H. M. Kelly sustained any damages or injuries as a result of having made the trade with the Shamrock Oil & Gas Corporation.

"In this connection you are further instructed that it is not necessary that either Fowlston or the Shamrock Oil & Gas Corporation intended any fraud or intentional injury to H. M. Kelly, but that nevertheless, your verdict should be for the plaintiffs, if you find that C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation in negotiating the purchase of Kelly's property, and if you further find that H. M. Kelly did not know that C. J. Fowlston was so acting." (R. 49, Request No. 10.)

ERRORS RELIED UPON

(1) The Circuit Court of Appeals erred in holding that the jury was fully instructed on the law of "dual agency" unknown to the seller and that Plaintiffs' requested instructions on that phase of the case were, therefore, properly refused.

(2) The Circuit Court of Appeals erred in holding that the trial court properly refused the instruction on circumstantial evidence. The foregoing errors were pointed out to the court in Paragraphs I, II, III, IV and VIII of the Petition for Rehearing.

FIRST QUESTION DISCUSSED

If the trial court did not give some kind of an instruction to the jury covering the Plaintiffs' theory that they were

entitled to recover if the jury found that Fowlston was acting in a dual capacity unknown to the Plaintiffs, then the trial court erred in refusing each of the foregoing requested instructions and the Circuit Court of Appeals should have reversed the case and sent it back for a new trial. For your convenience in determining whether or not the jury were instructed on the Plaintiffs' theory of recovery, we will number each paragraph and italicize the charge given by the court that you may readily distinguish between the charge given and our discussion of it. The charge begins on Page 280 of the Record and is as follows:

1.

"THE COURT: I give you the charge of the Court, it will be in the main, oral, so give attention that you may remember its provisions."

2.

"In this case, number 596 civil, styled Lawrence E. Kelly, Administrator, and others, v. Shamrock Oil & Gas Corporation, you are charged that the plaintiffs are the legal successors of H. M. Kelly, deceased."

3.

"That about the 24th of June, 1941, the said H. M. Kelly conveyed the surface and the greater portion of the minerals, as set forth in the pleading, under certain land in Moore County, Texas, which is described in the pleadings."

The foregoing paragraphs are preliminary in nature, and require no comment on this matter of whether or not

the trial court submitted the question of "dual agency unknown to Kelly" to the jury.

4.

"This suit is brought on the part of the plaintiffs to rescind that sale. As a basis for such the plaintiffs allege fraud on the part of their agent, the agent of H. M. Kelly, C. J. Fowlston, alleging that the said representative, or agent, Fowlston, pretended to his principal, H. M. Kelly, that the field in which his land was located was being depleted, and that the producing well thereon was sour gas and of smaller value; and that he concealed from his principle the facts, as alleged in his petition, to influence his principal to make this sale."

5.

"Now the defendant denies that they had any purpose in the reduction of the take to influence the action of the plaintiffs; the defendant denies that it was a party to any act to deceive or defraud or wrong the plaintiffs."

6.

"The burden of proof upon these issues is upon the plaintiff to establish his case by a preponderance of the evidence, which is the greater weight and degree of credible testimony. You are the judges of the weight of the testimony and of the credibility of the witnesses."

Paragraph 4 defines for the jury the basis of the plaintiffs' suit and enumerates what the court says are the plaintiffs' claim for relief. The court does not mention or even allude to the main theory upon which the plaintiffs presented this case to a court for determination of their rights; namely, that Fowlston was acting as the agent of Shamrock unknown to Kelly. The court's statement in

Paragraph 4 limits the plaintiffs' claim to *fraudulent representations* and impliedly excludes "dual agency unknown to Kelly." Paragraph 5 again charges the jury that the defendant denies the aforesaid specific acts of *fraudulent representation* and that defendant denies any part in any fraudulent or wrongful act. This paragraph again ignores and impliedly excludes from the consideration of the jury the question of "dual agency unknown to Kelly." Paragraph 6 simply places the burden of proof.

7.

"Now, applying these instructions you are instructed.

"If you find and believe, from a preponderance of the evidence, that the said C. J. Fowlston while acting as agent for H. M. Kelly, did, in conjunction with the defendant, Shamrock, and with the approval and connivance of the defendant, Shamrock, misrepresented to his principal the facts as alleged in the plaintiffs' petition and that the plaintiff relied upon those misrepresentations and was led to act upon them to his loss, then and in that event your verdict will be for the plaintiffs."

Paragraph 7 adverts again to the specific misrepresentations of fact. You will notice that even there, the court made a recovery dependent upon a further finding that the representations were made with the "approval and connivance" of the Shamrock and a "loss" to the Plaintiff. There is no allusion whatever to the plaintiffs' theory of "dual agency unknown to Kelly." "Loss" or "damage" is

not an element of the right to recover when a secret dual agency is shown.

8.

"Now, in connection with plaintiffs' case, there was offered a series of letters that passed between the plaintiff, deceased, H. M. Kelly, and his agent, Fowlston. The Court permitted these letters to be offered in evidence and to be read to you as evidence, but they may be considered by you only if you believe that Shamrock was also acting by and through the said Fowlston, or rather, that Fowlston was acting as an agent for Shamrock, as well as an agent for the deceased, Kelly. So, if the defendant, Shamrock, was not acting in a fraudulent way, then those letters would be merely hearsay. To explain—if two of you had a conversation in the absence of a third party, that party would not be bound by anything that passed between you, because you didn't hear it. Likewise, if two of you passed letters and the third person about whom, or concerning whom, the letters were written, did not know of their contents, and had not inspired their contents, when they would not be admissible against them, they would be hearsay. So, unless you find and believe that Fowlston was acting for Kelly, or was a party, or that Shamrock was a party to the fraud as charged, then these letters would not be admissible, and without such evidence the proof has failed as to fraud, and in the absence of fraud the defendant would recover."

Paragraph 8 simply charges the jury that the letters between Kelly and Fowlston would not be binding on the Shamrock and could not be considered as evidence against the Shamrock unless the jury found that Fowlston was also the agent of Shamrock. This paragraph deals with fraudulent representations of matters of fact. The court does not even intimate that the plaintiffs would be entitled

to recover if they found that Fowlston was also acting as the agent of Shamrock unknown to Kelly—a matter upon which plaintiffs were absolutely entitled to go to that jury with full instructions.

9.

"I give you certain charges requested by the plaintiff, and adopt them as a part of the law, which I will now read to you."

10.

"Fraud is an act or omission or concealment which involves a breach of legal duty toward confidence justly reposed and by which an undue or unconscionable advantage is taken of another."

These two paragraphs define fraud—not dual agency. Fraud is not dual agency. Fraud is not an element of dual agency. Fraud involves an *intent to deceive*—actual or constructive. The *intent to deceive* is not an element of the right to recover on a situation involving a dual agency unknown to one of the principals. *(Olson v. Pettibone, supra).*

11.

"I give you also the plaintiffs' requested instruction number nine:

"You are instructed that by agency is meant a relationship which is based upon a contract, express or implied, of the parties, or created by law, by virtue of which one party is employed and authorized to act for another. The party so employed is the agent and the one who so employs is the principal. In many instances agency arises not from the use of express language, nor from the existence of a well defined relationship, but from the general conduct of the parties. This relation may exist whether the parties so designate it or not. Agency may be established by

circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved."

12.

"You are further instructed that where a party acts in behalf of another under the latter's authority and for the latter's benefit, he is, in law, the agent of the latter."

Paragraphs 11 and 12 define "agency" and "agent," but they do not tell the jury that the plaintiffs are entitled to recover if they find that Fowlston was acting as agent of Shamrock unknown to Kelly.

13.

"I give you also requested instructions three, and, four of the plaintiff. Number three: No, I have given you in substance number three in another charge, so I will pass to number four."

14.

"If you find, from a preponderance of the evidence, that the Shamrock Oil and Gas Corporation reduced the take on Kelly number one for the months of December, 1940, and January, February, March and May of 1941, and that it was a part of the scheme made and entered into for the purpose of inducing H. M. Kelly to sell the gas royalty under section 238 to the Shamrock Oil and Gas Corporation; and, if you further find that H. M. Kelly would not have sold the gas royalty under section 238 to the Shamrock Oil and Gas Corporation had the Shamrock Oil and Gas Corporation reduced the take of Kelly number one, for the months mentioned, then you may return a verdict for the plaintiffs."

Paragraphs 13 and 14 instruct the jury on the law on the reduction in the gas take, but erroneously instruct

them that they must find further that the reduction was a part of the scheme made and entered into between Fowlston and Shamrock before they can find for plaintiffs. There is no allusion of any kind in those paragraphs to the matter of dual agency unknown to Kelly.

15.

"In like manner, I give you certain charges requested by the defendant which are adopted by the Court as a part of the law of the case. This is defendant's requested charge number two.

"You are instructed that C. J. Fowlston is to be regarded as the agent of the Shamrock Oil and Gas Corporation only if the plaintiffs have proven, by a preponderance of the evidence, that Shamrock Oil and Gas Corporation employed Fowlston to act for it as its agent in the very matter in controversy, and unless the plaintiffs have so proven, by a preponderance of the evidence, your verdict will be for the defendant."

This is defendant's requested instruction on when Fowlston can be considered the *agent* of Shamrock. It does not mention "dual agency" or plaintiffs' right to recover if they find that Fowlston was Shamrock's agent unknown to Kelly. The instruction ties in and refers back to Paragraphs 8, 7 and 4. Paragraph 8 deals with the weight to be given the letters, if any. In Paragraph 8, the jury is charged that the letters cannot be considered against the Shamrock unless they find an *agency* relationship between Shamrock and Fowlston. Paragraph 15 does not tell the jury they will find for plaintiff if they find a dual agency existed. On the contrary, it charges the jury that in no event can they find for plaintiff unless they first find that

Fowlston acted as the agent of Shamrock in making the *fraudulent misrepresentations* in question. The plaintiffs' recovery is made to depend upon the making of fraudulent representations of fact and not upon "dual agency unknown to Kelly." These plaintiffs were entitled to recover without reference to whether or not any fraudulent representations were made of any kind or character, provided, and provided only, that the jury should find that Fowlston was Shamrock's agent, and that Kelly did not know Fowlston was Shamrock's agent. Dual agency alone, unknown to Kelly, entitled plaintiffs to recover. Paragraph 15 refers back to Paragraph 4 and to specific misrepresentations of fact. There is no allusion to plaintiffs' right to recover on dual agency unknown to Kelly. Furthermore, the Court then proceeds to tell the jury to take the charge as a whole and the instructions together. This is his charge:

> "You are instructed to take the court's charge as a whole, and to remember to view the instructions as a whole, and not to 'hang your hat' as it were upon one paragraph only, but take the instructions together."

You cannot take those instructions separately or together and find in them a charge that the jury shall return a verdict for plaintiffs if they find from a preponderance of the evidence that Fowlston was acting as the agent of Shamrock unknown to Kelly. The Circuit Court says, "Also the requested charges to the effect that the mere receipt by Fowlston of money from both parties unknown to plaintiffs would invalidate the transaction whether or not Shamrock colluded with Fowlston or employed him to act

for it were properly denied." The Court is mistaken. We did not request the Court to give that kind of an instruction. We requested the trial court to charge the jury that if they found that Fowlston was acting as the agent of Shamrock unknown to Kelly, they would return a verdict for the plaintiffs. (R. 42, Request No. 2.)

16.

"I give you also requested instruction number seven, on the subject: You are instructed that Fowlston could become Shamrock's agent only if Shamrock employed him to act for it. You are further instructed that there was no impropriety in the issuance of the five hundred dollar check to Fowlston, if, as it states, it was a commission check that Shamrock's office General Manager, J. H. Dunn, authorized, the same not being for any service performed by Fowlston for it, Shamrock, but upon the good faith assumption, however mistaken, that Kelly's sale had been a sale at a net price, and it was Shamrock's obligation to pay a reasonable commission to Kelly's agent; and in such event, Fowlston, if not previously employed by Shamrock to act, did not become Shamrock's agent merely because of the issuance of the five hundred dollar check."

This paragraph charges affirmatively on one phase of *defendant's* theory, but completely ignores plaintiff's right to recover if the jury finds a dual agency unknown to Kelly. That portion of the charge in Paragraph 16 reading: "You are further instructed that there was no impropriety in the issuance of the five hundred dollar check to Fowiston, if, as it states, it was a commission check that Shamrock's office General Manager, J. H. Dunn, authorized, the same not being for any service performed by Fowl-

ston for it, Shamrock * * *," does not present plaintiffs' theory of recovery on dual agency. The impropriety or propriety of the issuance of the five hundred dollar check to Fowlston is evidentiary on the question of whether or not Fowlston was Shamrock's agent, but the propriety or impropriety of the issuance of the check has nothing whatever to do with plaintiffs' right to recover if in truth and fact Fowlston was Shamrock's agent unknown to Kelly. The remainder of that paragraph simply tells the jury that the payment of the commission check standing alone under the circumstances therein referred to would not make Fowlston the Shamrock's agent in and by themselves. That paragraph does not tell the jury that they shall find for plaintiff if a dual agency existed, but simply tells them they cannot consider the payment of the commission check *as evidence of agency* if they find that the check was issued under the circumstances asserted by the defendant. You have not yet found an instruction in the trial court's charge that told the jury, by implication, reference or allusion, that they should find for plaintiffs if in fact a dual agency existed unknown to Kelly.

17.

"Again I give you, in part, number eighteen:

"If you find, from a preponderance of the evidence, that H. M. Kelly, prior to the time of the execution and delivery of the deed in question covering section 238, mentioned in the testimony, made an independent investigation concerning the gas well located on said section, and that he relied on his independent investigation thereof, then plaintiff cannot recover against the defendant."

This paragraph deals with independent investigation and it makes no allusion to dual agency.

18.

"I also give you charge number seventeen: You are instructed under the circumstances in this case, that no duty rested upon the defendant, Shamrock Oil and Gas Corporation, to notify H. M. Kelly when the well in question was reclassified from a sour well to a sweet well, in December, 1940, and its failure to do so cannot be considered by you for any purpose."

Comment by us on this is unnecessary.

19.

"You are further instructed that the reduction in 'takes' of gas from the gas well in question, after the same was classified as a sweet gas well by the Railroad Commission of Texas, cannot be considered by you as evidence tending to establish any fraud or collusion on the part of the Shamrock Oil and Gas Corporation, or any evidence of employment by the defendant, the Shamrock Oil and Gas Corporation, of C. J. Fowlston, as an agent of the defendant, unless you first find, from the preponderance of the evidence, that at the time of the reduction in takes from said well, that the defendant, Shamrock Oil and Gas Corporation, had entered into a conspiracy with the said C. J. Fowlston to fraudulently misrepresent said well and the quality of the gas being purchased therefrom, to said Kelly, and unless you still further find that the said Fowlston did fraudulenly misrepresent said well and its quality of gas to said Kelly and the said Kelly did rely thereupon."

This is a return to the defendant's theory of a reduction in the gas take. The last three paragraphs affirmatively set out separate theories of the defense, but not once do we see a charge even hinting at plaintiffs' theory that they

were entitled to recover upon dual agency unknown to Kelly if that situation in fact existed—which theory the Circuit Court held to be sound law.

20.

"You are instructed to take the Court's charge as a whole, and remember to view the instructions as a whole, and not 'hang your hat' as it were, upon one paragraph only, but take the instructions together."

The jury was plainly told that they must take each paragraph and each instruction together as a whole and when they got through doing that they were left without a single thread of thought upon which to base a verdict for the plaintiffs even if they found beyond a reasonable doubt that Fowlston was acting as the agent of Shamrock unknown to Kelly.

21.

"We have rendered judgment in favor of the defendant Price. He bought the surface from the Shamrock, so Price is out of the case and you will not dispose of him in your verdict."

22.

"I give you the effect of your findings, in the light of the pleadings. A verdict for the defendant means that the plaintiff cannot recover—that the plaintiff will take nothing. A verdict for the plaintiff means the rescission of the sale, or, means that the minerals conveyed will be restored, it means that the surface, although sold, the value of it will be returned to the former owner in the form of a judgment. So it will be your duty, if you find for the plaintiff, to determine the value of the land. Now you may in your minds, and in your discussion, become confused as to what will become of the moneys that have been col-

lected that would have been royalty since this deed was made. Do not let that enter into your consideration. You may also be confused, in the event there is a decision, what will become of the money that was paid. Do not enter into that, the Court will see to an equitable adjustment of these funds."

23.

"The things that are submitted to you is whether or not there shall be a rescission of the sale, and the value of the land. The form of your verdict will be like this; if you find for the defendant you simply say so, and that will be all the findings; if you find for the plaintiff then your verdict will be in form and substance like this, and the clerk will furnish you the form which will be helpful to you, 'We find for the plaintiff a rescission of the sale, and find the value of the surface conveyed to Price to be $,' signing same by your foreman.

"Any exceptions on the part of the plaintiff.

"MR. SMITH: Your Honor indicated he would give our 1-c, I am wondering if the Court overlooked it."

There isn't a word yet about dual agency unknown to Kelly.

24.

"Yes, I give you the further instruction, now the evidence disclosed, and it is admitted in this case, that C. J. Fowlston was the agent of H. M. Kelly for the purpose of negotiating the sale involved in this suit. You are instructed that H. M. Kelly had a legal right to rely upon the representations and statements of C. J. Fowlston and that no duty devolved upon him to make an investigation concerning the truth or falsity of his statements, and I use these words, the said Fowlston must have been acting in a dual capacity before the same will be considered as support of, or

authorizing a verdict for the defendant; in other words, Fowlston must have been fraudulently representing the plaintiffs."

This paragraph deals with Kelly's right to rely upon Fowlston's representations of fact without making an investigation. The charge deals with Kelly's right to rely upon the active fraud of Fowlston *by positive assertions of false statements.* There isn't a word in it about dual agency unknown to Kelly and the plaintiffs' right to recover if the jury found that Fowlston was in fact Shamrock's agent unknown to Kelly.

The remainder of the charge constitutes a colloquy between the court and counsel, but we desire specifically to call your attention to the fact that the plaintiff was accorded a bill upon the Court's refusal to give the instructions requested. Counsel for the Plaintiff stated in the presence of the jury and before they had retired, "And, Your Honor, of course, I suppose we have a bill on the Court's overruling of those other requested instructions?" To which the Court answered, "That goes as a matter of course." (R. 289.)

We have demonstrated that plaintiff asked for a proper instruction on dual agency and that the Court refused it. We have shown that the Court did not instruct the jury on dual agency. Even if our requests had not been correct that would not have justified the trial court in failing to submit the question of dual agency to the jury:

"The fact that the defendant had incorporated errors of law in the instructions which it sought upon

the second defense did not justify putting the case to the jury solely upon the first." *St. Paul F. & M. Ins. Co. v. Bachmann, 76 L. Ed. 653.*

The trial court put this case to the jury solely upon active fraud by fraudulent representation and *excluded* dual agency. The Plaintiffs have been deprived of their right to have the jury pass upon this question: Was Fowlston acting as an agent of Shamrock unknown to Kelly? If he was, it having been admitted that Fowlston was Kelly's agent, the Plaintiffs were entitled to recover.

It cannot be assumed that the jury passed upon the question of dual agency adversely to Appellant.:

> "* * * it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do." *Judge Yankwich in 3 F. R. D. 118.*

All of the fact issues must be submitted to the jury with an exposition of the law that will enable them to reach a proper verdict upon the facts they find to exist.

> "Such an exposition of law, in order to attain its statutory purpose, should be clear, concise, definite, positive, direct and accurate. It should be as comprehensive as the issues of the case are numerous and as broad as the evidence; but it should not go beyond those limits." *Judge Seth Thomas in 1 F. R. D. 141.*

SECOND QUESTION DISCUSSED

Plaintiffs requested the Trial Court to instruct the jury that "you are instructed that any fact may be proved by circumstances as well as direct evidence." (R. 38, Request No. 1.) The request was refused. As an illustration of

the need for a charge on circumstantial evidence, Plaintiffs alleged that the Defendant was operating a gas well on the land in question. Plaintiffs further alleged that the Defendant fraudulently reduced the monthly "take" from the well for the purpose of deceiving Plaintiffs into believing that the well was rapidly depleting; that the fraudulent reduction in the gas take had the desired effect; and that Plaintiffs would not have sold the land but for the reduction in the take. (R. 12, et seq.)

The average monthly gas take from Kelly No. 1 for the five months preceding December, 1940, was 84,410,000 cubic feet. The average monthly allowable for that five months period was 85,358,000 cubic feet. (R. 169.) The royalty check for December, 1940, was mailed out about January 20, 1941. (R. 184.) Fowlston's letter opening negotiations was mailed on January 20, 1941. (Exhibits Page 32.) The average monthly gas take from Kelly No. 1 during the period of negotiations (some seven months) was 37,978,000 cubic feet—a 7/8rds reduction in the monthly take with the exception of the month of April, 1941. The average monthly allowable for those seven months was 258,278,000 cubic feet. (R. 169-170.) The deal was closed in June, 1941. (Exhibits Page 87.) The average monthly take from Kelly No. 1 for the succeeding six months was 251,161,000 cubic feet. (R. 110 to 121.) The average monthly allowable for that six months period was actually less than it had been for the six months during the negotiations—250,110,000. (R. 110 to 121.) The royalties paid Kelly were reduced accordingly. (Exhibits Page 91.)

The gas was sweet. It could be used for light and fuel purposes. (R. 175.) Kelly No. 1 was connected to the Defendant's McKee plant at all times. An analysis of the McKee plant operations report filed with the Railroad Commission shows that Shamrock had a market for the full allowable from Kelly No. 1 at all times during the negotiations. (Exhibits CC through PP, pages 128 through 157.) As an illustration, we take the month of January, 1941, shown as Plaintiff's Exhibits EE, pages 132-133: Daily intake 214,329,000 cubic feet; Plant used residue daily 8,602,000 cubic feet; leases used 142,000 cubic feet daily. Total legitimate sweet gas uses: 8,602,000 plus 142,000 equals 8,744,000 cubic feet daily. Gas taken daily from the two sweet gas wells was 3,686,000 cubic feet. The Shamrock therefore had an additional use or market for 8,744,000 minus 3,686,000 equals 5,058,000 cubic feet daily. That market was not supplied until it began to take the full allowable from Kelly No. 1 in July, 1941.

It should be noted that the J. B. Schlee well with an allowable of ⅓ that of Kelly No. 1 was the only other sweet gas well connected to the McKee plant during the negotiations. Although the allowable from the Schlee well was slightly less than ⅓ that of the Kelly well, the Shamrock continued to take almost 3 times the amount of gas from the Schlee well that it took from the Kelly well during the negotiations. (Exhibits P through V, pages 96 to 109.) It should be noted further that the take from the Schlee well was not decreased when the Shamrock started taking the

full allowable from Kelly No. 1 in July, 1941. (Exhibits W through M, Pages 110-119.)

Kelly testified that the reduction in the gas take from the well influenced his decision to sell and that if the reduction had not been made he would not have sold the land at all. (R. 117.)

In *Rea v. Missouri, 21 L. Ed. 707*, you reversed a lower court because it failed to charge on circumstantial evidence, saying:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

The refusal to charge on circumstantial evidence is aggravated by the fact that the Court instructed the jury that "agency" could be proved by that character of evidence and thereby impliedly charged them that no other fact could be proved by circumstantial evidence.

This record shows that the jury was not able to reach a verdict until after the Court's charge had been written up and delivered to the jury on its request. (R. 291.) The record shows that the jury followed the charge; that they were not authorized to consider "dual agency" as a basis for a verdict for the Plaintiffs nor take into consideration circumstantial evidence.

CONCLUSION

The law gives these Petitioners a right to recover their land in this case if it is a fact that Fowlston was acting as the agent of the Shamrock unknown to the Plaintiffs. The Plaintiffs are entitled to go to a jury on that fact issue

with proper instructions from the court on the law. They have been denied that right. No one has ever pointed out a single paragraph, sentence or phrase in the Court's charge that instructs or purports to instruct the jury on the law with reference to "dual agency" unknown to one of the principals. The Circuit Court of Appeals did not do that in their opinion. Surely, if the Court instructed the jury on the law of "dual agency", counsel for the Respondent can point it out to you in its reply to this Petition for a Writ of Certiorari. It will not be done, because it is not in the charge.

WHEREFORE, Petitioners pray that the Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and that this cause be reversed with instructions to the Trial Court to submit the case to the jury with appropriate instructions on dual agency and circumstantial evidence.

Respectfully submitted,

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